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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 410

JACKSON BREWING COMPANY,

Petitioner,

v.

JACK D. CLARKE, JR.,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, JACKSON BREWING COMPANY, files herewith its petition for rehearing herein, and as a basis for such petition would respectfully show the court the following:

I.

After the filing of the petition for certiorari in this court on September 5, 1962 there were published in the Federal Reporter Advance Sheets two opinions from different Circuit Courts of Appeal, *Local No. 338* v. *Dairymen's League Co-Operative Association, Inc.* (CA-2 1962) 304 Fed. 2d 913, and *Lutes, et al* v. *District Court* (CA-10 1962) 306 Fed. 2d 948, which indicate a direct conflict between those Circuits on the basic problem, presented as questions two and three in the petition for certiorari, of whether a District Court may stay proceedings before it solely on the ground that related litigation is pending in a State Court.

II.

In *Local No. 338* v. *Dairymen's League, supra,* the union had applied to the Federal District Court for an injunction to maintain the status quo between the parties pending the arbitration of a dispute. The District Court decided that, since the same dispute was already pending in the New York State Courts, no injunction should be issued, and the Federal Court action should be stayed to await the completion of the State Court proceedings. On the Union's appeal from the refusal to grant the injunction, the Court of Appeals held that since the stay of proceedings on the merits was proper, there was no abuse of discretion in the refusal to grant an injunction. In connection with the stay of proceedings the court made the following comment:

> "It is an established rule in this Circuit that the District Court has the power to stay its proceedings if there is a prior action involving the same dispute pending in the State Courts. Mottolese v. Kaufman, 2 Cir. 1949, 176 F. 2d 301; P. Beiersdorf & Co. v. McGohey, 2 Cir. 1951, 187 F. 2d 14; Ferguson v. Tabah, 2 Cir. 1961, 288 F. 2d 665; Ballantine Books, Inc. v. Capital Distributing Co., 2 Cir. 1962, 302 F. 2d 17. . . . . ." (Page 915).

III.

In *Lutes* v. *District Court, supra,* nineteen different suits had been filed in the Federal District Court involving the interpretation of certain oil and gas leases. After some, but not all, of these nineteen cases were filed, the defendant in the Federal Court suits had brought suit in the State Court to determine the same questions presented in the Federal Court cases. Thereupon, on application of the defendant in the Federal Court, the District Court stayed the proceedings before it until the State Court suits should be decided.

In determining that the District Court had abused its discretion, and that a writ of mandamus should be issued to require the Court to proceed with and determine the actions pending before it, the Court of Appeals wrote in part as follows:

> "We have before us routine contract cases in which private parties disagree as to the effect of private contract provisions. The issues do not present any federal or state constitutional or statutory questions. No public officials or public agencies will be affected by the result. No hazard of a disturbance in the sensitive field of federal-state relationships is suggested. If we were to forego the exercise of the properly invoked diversity jurisdiction until state court decisions were obtained on identical contracts applying to identical facts, then the doctrine of abstention is extended far beyond any limits which have as yet been fixed by the Supreme Court of the United States and an easy method is afforded the district courts for the avoidance of decisions in difficult cases." (Pages 949-950)

IV.

Petitioner submits that the above analysis is exactly applicable to the facts of the present case. It is true that in the *Lutes* case the court made some reference to the fact that federal jurisdiction was properly invoked before the state court cases were filed, but it is also true that some of the federal court cases were filed after the initiation of the state court suits. In any event, the question presented here should not be made to depend upon who wins a race to the courthouse, especially when the difference in filing time is merely a matter of days.

V.

It is clear from a comparison of the above cases that in the Second Circuit a district judge has complete discretion to stay proceedings pending the determination of related and prior state court litigation, whereas in the Tenth Circuit he has no such discretion, except under the principles laid down by this court in the abstention cases cited in the petition for certiprari. On the basis of its action in refusing to entertain Petitioner's motion for leave to file petition for mandamus the Court of Appeals for the Fifth Circuit must be aligned on this question with that of the Second. It is therefore clear that a conflict of decisions among the Circuits now exists, which was not apparent when this case was originally filed in this court. It is also clear that the question presented is one of substantial importance in the administration of justice in the federal courts and that a uniform rule, applicable in all circuits, is essential "to secure the just, speedy, and inexpensive determination of every action." Rule 1, FRCP.

Wherefore, premises considered, petitioner respectfully requests that this petition for rehearing and its petition for writ of certiorari herein, be granted.

Cornelius O. Ryan
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Houston 2, Texas

Attorney for Petitioner,
Jackson Brewing Company

I certify that the above and foregoing petition for rehearing is presented in good faith and not for delay.

.....

CORNELIUS O. RYAN
Attorney for Petitioner
Jackson Brewing Company

PROOF OF SERVICE

I, Cornelius O. Ryan, counsel of record for Jackson Brewing Company, petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that I served a copy of the above and foregoing petition for rehearing in this cause upon Respondent Jack D. Clarke, Jr. by delivering a copy to a clerk in the office of Walter E. Workman, Esq., one of his counsel of record, at 1600 Esperson Building, Houston 2, Texas, on the ..... day of November, 1962.

.....

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